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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOEL CIRILO SOSA HERNANDEZ, Defendant.	No. CR 11-00436(A)-MRW GOVERNMENT'S TRIAL MEMORANDUM Trial Date: December 6, 2011 Trial Time: 9:00 a.m. Courtroom of the Honorable Michael R. Wilner

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California, hereby submits its trial memorandum.

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I.

CASE SCHEDULING MATTERS

Jury trial is set for December 6, 2011, at 9:00 a.m. The estimated time for the government's case-in-chief is three days. Defendant Joel Cirilo Sosa Hernandez ("defendant") is not in custody pending trial.

A. Lay Witnesses

At this time, the government anticipates calling up to 15 witnesses in its case-in-chief. Those witnesses include four Police Officers with the Los Angeles Police Department ("LAPD"), two Special Agents with U.S. Immigration and Customs Enforcement ("ICE"), and at least nine former employees of the 907 Club (including one woman who acted as a confidential informant in ICE's investigation of the club). The government expects that the testimony of the former employees would be relatively brief.

B. Expert Witnesses

1. Applicable Law

If specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. An expert's opinion may be based on hearsay or facts not in evidence, where the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703. An expert may provide opinion testimony even if it embraces an ultimate issue to be decided by the trier of fact. Fed. R. Evid. 704.

The court has broad discretion to determine whether to admit expert testimony. United States v. Anderson, 813 F.2d 1450, 1458

(9th Cir. 1987); United States v. Binder, 769 F.2d 595, 601 (9th Cir. 1985).

2. Anticipated Witnesses

The government anticipates calling two of its percipient witnesses as experts: One expert, ICE Special Agent Craig Porter will testify as to the required employment verification system and related forms (like the "I-9" form) that an employer must prepare when hiring an employee. The second expert, LAPD Officer Ernesto Carbajal will testify as to the falsity of the identification cards seized during the LAPD raid at the 907 Club on November 5, 2011.

II.

THE FIRST SUPERSEDING INFORMATION

Defendant is charged in a one-count First Superseding Information, filed on September 21, 2011, with violating Title 8, United States Code, Section 1324a(a)(1)(A), (a)(2), and (f)(1) (Hiring and Continuing to Employ Unauthorized Aliens).

There are two ways that the defendant may be guilty of this offense. The following is the first way. In order for the defendant to be found guilty, the government must prove each of the following elements beyond a reasonable doubt:

First, defendant hired an alien for employment in the United States;

Second, defendant hired the alien knowing that the alien was an unauthorized alien with respect to that employment;

Third, defendant engaged in a pattern or practice of knowingly hiring aliens who are unauthorized aliens with respect to that employment. 8 U.S.C. §§ 1324a(a)(1)(A), (f)(1).

The following is the second way that defendant may be guilty of the charged offense. The government must prove each of the following elements beyond a reasonable doubt:

First, defendant hired for employment an alien;

Second, defendant knew that the alien was or had become an unauthorized alien with respect to that employment;

Third, defendant continued to employ that alien; and

Fourth, defendant engaged in a pattern or practice of the foregoing conduct. 8 U.S.C. §§ 1324a(a)(2), (f)(1).

The term "unauthorized alien" means 1) an alien who is not lawfully admitted for permanent residence (commonly known as a "green card" holder) or 2) an alien who is not otherwise authorized for that employment. 8 U.S.C. § 1324a(h)(3).

III.

STATEMENT OF FACTS

The government intends to prove at trial the following facts, among others:

The 907 Club was a "hostess club" in downtown Los Angeles where customers paid to talk and dance with the club's hostesses, a majority of whom were illegal aliens. Defendant Sosa was a manager at the club, and he participated in the hiring of the women who worked there.

Several women who worked at the 907 Club will testify that when they applied for a job, they told defendant that they had no valid identification, but that defendant hired them anyway. Some witnesses will also testify that defendant instructed them to purchase false identification documents. In addition, a woman who worked as a confidential informant in ICE's investigation of

the 907 Club will testify that defendant counseled her (in a video- and audio-taped Spanish conversation) on what to say to police if they caught her at the club with her false identification.

The former club employees also will testify about the 907 Club's harsh, and arguably illegal, employment policies that defendant Sosa enforced. These policies included refusing to fully pay employees for the hours they worked and not paying overtime.

Defendant was one of four managers at the 907 Club. Former employees may testify that the other managers followed the same pattern and practice as defendant, hiring women who they knew had no valid identification and also instructing women to buy false identification documents at, for example, MacArthur Park in Los Angeles. In addition, several women will testify that although a different manager hired them, defendant Sosa was aware of their immigration status when they worked at the 907 Club.

On November 5, 2010, LAPD executed a search warrant against the 907 Club, and seized numerous false identification documents from employees and also the 907 Club's employment records. LAPD Officers and ICE Special Agent Craig Porter will testify about the false identifications seized and the records obtained from the club. Almost all of the employment records included incomplete "I-9" forms, which an employer must complete as part of the process to verify that an employee is authorized to work in the United States. 8 U.S.C. § 1324a(b)(1)(A); 8 C.F.R. § 274a.2.

LAPD officers may further testify that on December 2, 2010, less than one month after it raided the 907 Club, LAPD returned to the 907 Club and found four women working there without valid California identification cards. One woman, whom the government may call as a witness, only had a Mexican identification card, and she told police that defendant allowed her to work at the club.

IV.

LEGAL AND EVIDENTIARY ISSUES

A. Documents - Generally

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) under the circumstances, it would be unfair to admit the duplicate instead of the original. Fed. R. Evid. 103. United States v. Smith, 893 F.2d 1573, 1579 (9th Cir. 1990).

If the underlying documents are admitted in evidence, charts or summaries may be admitted in evidence for the purpose of explaining facts disclosed by those documents. Fed. R. Evid. 1006; United States v. Catabran, 836 F.2d 453, 458 (9th Cir. 1988); United States v. Meyers, 847 F.2d 1408, 1412 (9th Cir. 1988).

B. Authentication, Identification, and Chain of Custody

Fed. R. Evid. 901(a) provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Rule 901(a) only requires the government to make a prima facie showing of authenticity or identification "so that a reasonable juror could find in favor of authenticity or identification." United States v. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir. 1991); United States v. Blackwood, 878 F.2d 1200, 1202 (9th Cir. 1989); United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985). Once the government meets this burden, "the credibility or probative force of the evidence offered is, ultimately, an issue for the jury." Black, 767 F.2d at 1342.

To be admitted into evidence, a physical exhibit must be in substantially the same condition as when the crime was committed. The court may admit the evidence if there is a "reasonable probability the article has not been changed in important respects." United States v. Harrington, 923 F.2d 1371, 1374 (9th Cir. 1991); see also id. ("The prosecution must introduce sufficient proof so that a reasonable juror could find that the items in the bag are in substantially the same condition as when they were seized.") (quotations omitted).

This determination is to be made by the trial judge and will not be overturned except for clear abuse of discretion. Factors the court may consider in making this determination include the nature of the item, the circumstances surrounding its preservation, and the likelihood of intermeddlers having tampered with it. Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960).

The government need not establish all links in the chain of custody of an item or call all persons who were in a position to come into contact with it. Reyes v. United States, 383 F.2d 734

(9th Cir. 1967); Gallego, 276 F.2d at 917. Alleged gaps in the chain of custody go to the weight of the evidence rather than to its admissibility. United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995). Further, in the absence of evidence of tampering, there is a presumption that public officers have properly discharged their official duties. Harrington, 923 F.2d at 1374; Gallego, 276 F.2d at 917.

C. Business Records

For business records to be admissible, the following foundational facts must be established through the custodian of records or another qualified witness: (1) The records must have been made at or near the time by, or from information transmitted by, a person with knowledge; and (2) the records must have been made and kept in the course of a regularly conducted business activity. Fed. R. Evid. 803(6). United States v. Bland, 961 F.2d 123, 126-28 (9th Cir. 1992). The phrase "other qualified witness" is broadly interpreted to require only that the witness understand the record-keeping system. United States v. Ray, 930 F.2d 1368, 1370-71 (9th Cir. 1990). A business record may contain erasures or be incomplete. Bland, 961 F.2d at 127.

Certified domestic records of regularly conducted activity are self-authenticating when accompanied by a written declaration establishing that (1) the records must have been made at or near the time by, or from information transmitted by, a person with knowledge; and (2) the records must have been made or kept in the course of a regularly conducted business activity. Fed. R. Evid. 902(11).

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D. Public Records

The government may seek to introduce certified public records during the course of trial. Public records, reports, statements, or data compilations of public offices or agencies setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report, are admissible as an exception to the hearsay rule. Fed. R. Evid. 803(8).

The absence of a public record, report, statement, or data compilation, or the nonexistence of a matter of which a record, report, statement, or data compilation was regularly made and preserved by a public office or agency is admissible as an exception to the hearsay rule. Fed. R. Evid. 803(10).

Certified copies of public records are self-authenticating and do not require extrinsic evidence of authenticity as a condition precedent to admissibility. Fed. R. Evid. 902(1), (4).

E. Jury Nullification

A defendant does not have a right to a jury nullification instruction. United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991). Having no right to seek jury nullification, defendant has no right to present evidence relevant only to such a defense. Zal v. Steppe, 968 F.2d 924, 930 (9th Cir. 1992) (Trott, J., concurring).

F. Reciprocal Discovery

The government has requested all reciprocal discovery from defendant, but received nothing in response to its requests. To the extent defendants may attempt to introduce or use any documents or tangible evidence at trial that they has not

produced, the government reserves the right to object and to seek to have such evidence precluded.

G. Affirmative Defenses

The government has requested notice of any affirmative defenses that defendant intends to raise, including entrapment, mental condition, and duress. To date, defendants have not indicated whether they intend to raise any affirmative defenses.

H. Good Faith Defense

The government filed a Motion in Limine to Preclude a Good Faith Defense (CR 57) on November 18, 2011. In its motion, the government noted how a good faith defense is not available to an individual who fails to properly complete a Form I-9. See Maka v. INS, 904 F.2d 1351, 1360 (9th Cir. 1990). Moreover, the government noted how a good faith defense is not available to an individual who engages in a "pattern or practice" of knowingly hiring or continuing to employ unauthorized aliens. See 8 U.S.C. § 1324a(b)(6)(C).

I. Party Admissions

Under the Federal Rules of Evidence, a defendant's statement is admissible only if offered against the defendant; a defendant may not elicit his own prior statements. Fed. R. Evid. 801(d)(2)(A); United States v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1988).

Records or documents in defendant's possession are admissible as adoptive admissions under Fed. R. Evid. 801(d)(2)(B) so long as evidence shows that the defendant acted upon them or otherwise manifested his adoption of them. See United States v. Ospina, 739 F.2d 448, 451 (9th Cir. 1984);

United States v. Carrillo, 16 F.3d 1046, 1048-49 (9th Cir. 1994); United States v. Paulino, 13 F.3d 20, 24-25 (1st Cir. 1994).

J. Character Evidence

The Supreme Court has recognized that character evidence - particularly cumulative character evidence - has weak probative value and great potential to confuse the issues and prejudice the jury. Michelson v. United States, 335 U.S. 469, 480, 486 (1948). The Court has thus given trial courts wide discretion to limit the presentation of character evidence. Id. at 486.

Rule 404(a) of the Federal Rules of Evidence governs the admissibility of character evidence. Rule 404(a) permits a defendant to introduce evidence of a "pertinent" trait of character. If the defendant does not testify and have his character for truth and veracity attacked, no character evidence may be offered on that point under either Rule 404(a) or Rule 608(a). United States v. Condoli, 870 F.2d 496, 505-06 (9th Cir. 1989).

The form of the proffered evidence must be proper. Federal Rule of Evidence 405(a) sets forth the sole methods by which character evidence may be introduced. It specifically states that where evidence of a character trait is admissible, proof may be made in two ways: (1) by testimony as to reputation; and (2) by testimony as to opinion. Thus, defendant may not introduce specific instances of his good conduct through the testimony of others. Michelson, 335 U.S. at 477 ("The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits"); United States v. Hedgcorth, 873 F.2d 1307, 1313

(9th Cir. 1989) ("[W]hile a defendant may show a character for lawfulness through opinion or reputation testimony, evidence of specific acts is generally inadmissible") (citations omitted).

For example, evidence of defendant's family or employment status is irrelevant to whether defendant is believable and to whether defendant is law-abiding, and thus inadmissible. United States v. Santana-Camacho, 931 F.2d 966, 967-68 (1st Cir. 1991) (testimony of defendant's daughter purportedly showing that defendant was a good family man was inadmissible character evidence inasmuch as such character traits were not pertinent to charged crime of illegally bringing aliens into the United States).

K. Impeachment of Witnesses

Under the Federal Rules of Evidence, the credibility of a witness may be impeached by evidence of certain criminal convictions of the witness. Rule 609(a) authorizes impeachment with evidence of recent felonies (at the court's discretion) or any crimes involving dishonesty or false statements.

As a general rule, character witnesses called by the defendant may not testify about specific acts demonstrating a particular trait or other information acquired only by personal observation and interaction with the defendant; the witness must summarize the reputation or opinion of the defendant as known in the community. Michelson, 335 U.S. 469; Hedgcorth, 873 F.2d at 1313.

On cross-examination of defendant's character witnesses, the government may inquire into specific instances of defendant's

past conduct relevant to the character trait at issue. Fed. R. Evid. 405(a); Michelson, 335 U.S. at 482-87.

The only prerequisite to such inquiries into specific instances of conduct is that there be a good faith basis that the incidents inquired about be relevant to the character trait at issue. United States v. McCollom, 664 F.2d 56, 58 (5th Cir. 1981); United States v. Bright, 588 F.2d 504 (5th Cir. 1979).

Prior consistent statements are admissible to rebut a charge of recent fabrication, improper influence, or motive. Fed. R. Evid. 801(d)(1)(B); United States v. Stuart, 718 F.2d 931, 934 (9th Cir. 1983).

Federal Rule of Evidence 608(b) "prohibits the use of extrinsic evidence of conduct to impeach a witness' credibility in terms of his general veracity." United States v. Castillo, 181 F.3d 1129, 1132 (9th Cir. 1999). By contrast, "the concept of impeachment by contradiction permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence." Id.

The Ninth Circuit has recognized "the significant distinction noted by many authorities" between "impeachment by contradiction" arising from what a witness "volunteered on direct examination" and cross-examination, where "opposing counsel may manipulate questions to trap an unwary witness into 'volunteering' statements." Castillo, 181 F.3d at 1133. "[E]xtrinsic evidence may not be admitted to impeach testimony invited by questions posed during cross-examination." Id. And while not a bright-line rule, the Ninth Circuit "recognize[s] as a practical matter trial courts likely will use the bright

line distinction as a rule of thumb subject to exception only in rare situations where it is clear that testimony on cross-examination was truly volunteered." Id. at 1134 & n.1.

To impeach the credibility of a witness with a "prior inconsistent statement," the Supreme Court has held that "the court must be persuaded that the statements are indeed inconsistent." United States v. Hale, 422 U.S. 171, 176 (1975). Thus, if the witness does not testify to something that is inconsistent with a prior statement, there is no "prior inconsistent statement" with which to impeach the witness. See id.

If defendant attempts to use a purportedly inconsistent prior statement with a testifying witness, then the government may on re-direct seek to admit the entire record from which the impeachment statement was drawn to place what might be a small inconsistency in a broader context of a generally consistent account, and thus to give the jury a more complete and accurate sense of the witness's credibility. See United States v. Collicott, 92 F.3d 973, 980 (9th Cir. 1996) ("After a witness has been impeached with prior inconsistent statements, we have admitted the entire conversation or document from which the impeachment statements were drawn if it has significant probative force bearing on credibility apart from mere repetition by placing the inconsistencies in a broader context, demonstrating that the inconsistencies were a minor part of an otherwise consistent account.") (quotations and ellipses omitted).

V.

CONCLUSION

The government hereby respectfully requests leave to file supplemental trial memoranda before or during trial, as it may become appropriate.

DATED: November 29, 2011

Respectfully submitted,

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